ROMI AMORA AMIR A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
SULAIMAN DAUD JCA
[CRIMINAL APPEAL NO: J-05-27-2009]
1 NOVEMBER 2010 C

CRIMINAL LAW: *Dangerous Drugs Act - Sections 6, 12(2) - Possession of 0.70g of cannabis - Whether affirmative finding of possession made out - Whether appellant had knowledge of drugs found on his body*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a), (2) - Trafficking in 466.40g cannabis - Appeal against conviction and sentence - Possession of dangerous drugs, whether established - Element of knowledge not proven - Whether prima facie case of trafficking established - Failure by trial judge to undertake maximum evaluation exercise - Presumption of trafficking rebutted on a balance of probability - Whether conviction and sentence safe* D E

Acting on information received, Chief Inspector Zambri ('PW5') together with two other police personnel conducted surveillance at Taman Kim Teng, Johor Bahru. PW5 saw a taxi bearing registration no. HJ 6648 enter the surveillance area and park next to the row of shops there. PW5 and his men saw the appellant getting out of the taxi and walking towards the row of shops. PW5 stopped the appellant and upon a body search, PW5 found a small packet suspected to contain cannabis ('P13') and a bunch of keys with a remote control attached to it. By using the keys and the remote control, PW5 opened the door of the taxi. Under the driver's seat, PW5 found a plastic bag containing a compressed slab suspected to be cannabis ('P9'). P9 was wrapped with transparent plastic package on the outer layer and an aluminium foil on the inner layer, attached together with a yellow coloured cellotape. The appellant was indicted with two charges. The first charge was for an offence of trafficking in dangerous drugs, 466.40 gram Cannabis, under s. 39B(1)(a) of the Dangerous Drug Act 1952 ('the Act') and the second offence under s. 6 of the Act of having in his possession dangerous drugs, 0.70 gram Cannabis, punishable under s. 12(2). PW2 (the owner of the taxi) testified that she bought the taxi in 2002 but since then had rented it out to one Razali ('PW3') for a F G H I

A monthly rental. According to PW3, the taxi was always under his custody and when not plying for passengers always parked it at his house. He further testified that he had in his possession both the main and secondary keys. He regularly used the main key, with the secondary key being placed inside an unlocked drawer, at his house.
B PW3 admitted that the appellant was his friend and that the appellant had borrowed the taxi from him. PW3 further testified that he did not find any plastic bag inside the taxi when it was sent for cleaning at the car wash centre. The High Court found the appellant guilty and convicted him of both charges. The appellant
C appealed against this decision. In the notes of proceedings, the learned judge said since the amount seized was 466.40 grams of cannabis, s. 37(da) of the Act was therefore applicable.

Held (allowing the appeal against the first charge and dismissing
D **the appeal against the second charge)**
Per Suriyadi Halim Omar JCA:

(1) After discussing the ingredient of possession in the grounds of judgment, the learned judge failed to evaluate the ingredient of
E trafficking. If not for a mere mention in the notes of proceedings of the invocation of the presumptive provision, the appellate court would have been at a loss as to the route undertaken pertaining to the establishment of the ingredient of trafficking. Further, in the grounds of judgment, the learned
F judge made no attempts to discuss the facts that led to the invocation of s. 37(da) of the Act or make a maximum evaluation of the evidence in relation to it. This failure went against the enunciation of the Federal Court in *Balachandran v. PP* in that a presiding judge must undertake a maximum
G evaluation exercise at the end of the prosecution and again at the defence stage. (para 9)

(2) The prosecution failed to establish the ingredient of knowledge in relation to P9. In order for the prosecution to establish possession, it must in the first place establish that the appellant
H was aware of the presence of the package. The learned judge erred in holding the view that the appellant knew of P9 being under the driver's seat. The learned judge had chosen to ignore the evidence of PW5 who testified that the cannabis could be inserted from the rear part of the seat. Since the prosecution
I had failed to establish that the appellant knew the package was under his seat it naturally followed that he would not know the contents. Therefore, the prosecution failed to establish the ingredient of possession. (paras 11 & 12)

(3) Even if the prosecution had successfully established the ingredient of possession, there was no tell-tale sign of overt act, conduct or evidence which could upgrade that possession to trafficking. Even PW5 had confirmed that the appellant did not put up any struggle or attempt to flee from the scene but only looked stunned and surprised when arrested. Even though the appellant was alleged to have pushed away the hands of PW5 at the time of arrest, there was nothing to indicate that his reaction was not pertaining to the drugs found on him rather than of P9. Thus, he had rebutted the presumption of trafficking on a balance of probability. (para 19)

Bahasa Malaysia *Translation Of Headnotes*

Bertindak atas maklumat yang diterima, Ketua Inspektor Zambri ('PW5') bersama dengan dua kakitangan polis melakukan pengawasan di Taman Kim Teng, Johor Bahru. PW5 nampak sebuah teksi dengan nombor pendaftaran HJ 6648 memasuki tempat pengawasan dan berhenti di sebelah sederet kedai-kedai di sana. PW5 dan orangnya nampak perayu keluar dari teksi dan berjalan menuju kepada kedai-kedai tersebut. PW5 menahan perayu dan selepas melakukan pemeriksaan badan, PW5 menjumpai satu paket kecil yang dicurigai mengandungi kanabis ('P13') dan beberapa kunci dengan sebuah alat kawalan dengannya. Dengan menggunakan kunci dan alat kawalan, PW5 membuka pintu teksi. Di bawah tempat duduk pemandu, PW5 menjumpai satu beg plastik yang mengandungi sekeping mampat yang dicurigai adalah kanabis ('P9'). P9 ditutup dengan pakej plastik lutsinar pada lapisan luar dan kerajang aluminium pada lapisan dalam, bersama-sama dengan selotep berwarna kuning. Perayu telah didakwa dengan dua pertuduhan. Pertuduhan pertama adalah bagi kesalahan mengedar dadah berbahaya, 466.40 gram kanabis, di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') dan kesalahan kedua di bawah s. 6 Akta iaitu memiliki dadah berbahaya, 0.70 gram kanabis, yang boleh dihukum di bawah s. 12(2). PW2 (pemilik teksi) memberi keterangan bahawa beliau telah membeli teksi itu dalam 2002 tetapi semenjak itu telah menyewakannya kepada seorang yang bernama Razali ('PW3') untuk sewa bulanan. Menurut PW3, teksi itu selalu di bawah jagaannya dan apabila tidak mencari penumpang selalu diletak di rumahnya. Beliau lagi memberi keterangan bahawa beliau memiliki kedua-dua kunci-kunci utama dan kedua. Beliau selalu menggunakan kunci utama, dengan kunci kedua diletakkan dalam laci yang tidak dikunci, di rumahnya. PW3 mengaku bahawa perayu adalah kawannya dan bahawa perayu telah meminjam teksi tersebut

darinya. PW3 lagi memberi keterangan bahawa beliau tidak menjumpai apa-apa beg plastik di dalam teksi apabila ianya dihantar untuk dibasuh di pusat basuh kereta. Mahkamah Tinggi mendapati perayu bersalah dan menyabitkannya atas kedua-dua pertuduhan. Perayu merayu terhadap keputusan ini. Dalam nota-nota prosiding, yang arif hakim mengatakan bahawa oleh kerana amaun yang dirampas adalah 466.40 gram kanabis, s. 37(da) Akta boleh digunapakai.

Diputuskan (membenarkan rayuan terhadap pertuduhan pertama dan menolak rayuan terhadap pertuduhan kedua)
Oleh Suriyadi Halim Omar JCA:

(1) Selepas membincangkan unsur milikan dalam alasan-alasan penghakimannya, yang arif hakim gagal menimbangkan unsur mengedar. Jika penggunaan peruntukan anggapan tidak disebutkan dalam nota prosiding, mahkamah rayuan tidak akan tahu jalan yang diambil berhubungan dengan pembuktian unsur mengedar. Lagipun, dalam alasan-alasan penghakiman, yang arif hakim tidak membuat apa-apa percubaan untuk membincangkan fakta-fakta yang membawa kepada penggunaan s. 37(da) Akta atau membuat suatu penimbangan maksima keterangan berkenaan dengannya. Kegagalan ini bertentangan dengan penjelasan Mahkamah Persekutuan dalam *Balachandran v. PP* bahawa seseorang hakim bersidang mesti mengusahakan suatu pelaksanaan penimbangan maksima di penutup pendakwaan dan sekali lagi di peringkat pembelaan.

(2) Pendakwaan gagal membuktikan unsur pengetahuan berhubungan dengan P9. Bagi pendakwaan membuktikan milikan, ia mesti pertamanya membuktikan bahawa perayu sedar tentang kehadiran pakej itu. Yang arif hakim khilaf dalam memutuskan bahawa perayu tahu P9 berada di bawah tempat duduk pemandu. Yang arif hakim tidak mempedulikan keterangan PW5 yang memberi keterangan bahawa kanabis tersebut boleh dimasukkan dari bahagian belakang tempat duduk. Oleh kerana pendakwaan telah gagal membuktikan bahawa perayu tahu pakej itu berada di bawah tempat duduknya ia sewajarnya bermaksud bahawa beliau tidak tahu kandungannya. Oleh yang demikian, pendakwaan gagal membuktikan unsur milikan.

(3) Jikapun pendakwaan berjaya membuktikan unsur milikan, tiada apa tanda ketara tindakan, kelakuan atau keterangan terang-terangan yang boleh meningkatkan milikan menjadi mengedar.

PW5 pun telah mengesahkan bahawa perayu tidak cuba melarikan diri dari tempat kejadian tetapi hanya nampak terperanjat apabila ditangkap. Meskipun perayu telah dikatakan menolak tangan PW5 pada masa penangkapannya, tidak ada apa-apa untuk menunjukkan bahawa reaksinya tidak berkaitan dengan dadah yang dijumpai padanya dan bukan P9. Oleh itu, beliau telah mematahkan anggapan mengedar atas imbangan kebarangkalian.

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Mohd Zaiham Mislan v. PP [2010] 1 CLJ 1 FC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Haling Arala Jimjani [2008] 4 CLJ 163 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Warner v. Metropolitan Police Commissioner [1968] 2 All ER 356 ***(refd)***

Legislation referred to:
Dangerous Drug Act 1952, ss. 2, 6, 12(2), 37(da), 39B(1)(a)

For the appellant - Firus Jaffril; M/s Firus Jaffril, Aidil & Zarina
For the respondent - Siti Rafidah Zainuddin; AG's Chambers

[Appeal from High Court, Johor Bahru; Criminal Trial No: MT(93) 45-08-2000]

Reported by Amutha Suppayah

JUDGMENT

Suriyadi Halim Omar JCA:

[1] The appellant was indicted with two charges. The first charge was for an offence of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drug Act 1952 (the Act) and the second offence under s. 6 of the Act of having in his possession dangerous drugs punishable under s. 12(2). The charges against the appellant read as follows:

The first charge

Bahawa kamu pada 24 Julai 2005, jam lebih kurang 4.20 pagi, di hadapan Kedai Wah Seng Cold Storage, Jalan Tebrau Kim Teng Park di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim, telah didapati mengedar dadah merbahaya iaitu 466.40 gram Cannabis, dengan itu

A kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Merbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

The second charge

B Bahawa kamu pada 24 Julai 2005, jam lebih kurang 4.20 pagi, di hadapan Kedai Wah Seng Cold Storage, Jalan Tebrau Kim Teng Park di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim, telah didapati mengedar dadah merbahaya iaitu 0.70 gram Cannabis, dengan itu kamu C telah melakukan suatu kesalahan di bawah seksyen 6 Akta Dadah Merbahaya 1952 dan boleh dihukum di bawah Seksyen dan Akta yang sama.

[2] The High Court found the appellant guilty and convicted him of both charges. For the first charge, he was sentenced to death D whereas for the second charge, he was sentenced to one year imprisonment, with effect from the date of his arrest. The appellant then appealed to us against the decision of the High Court and we allowed the appeal against the first charge but not the second appeal.

E

[3] The brief facts of this appeal are as follows:

[4] On 24 July 2010, at about 3.10am acting on information received, Chief Inspector Zambri bin Razab (PW5) together with two other police personnel conducted surveillance at Jalan Tebrau F Taman Kim Teng Park, Johor Bahru. At about 4.20am. PW5 saw a taxi bearing registration no. HJ 6648 enter the surveillance area and park next to the row of shops there. PW5 and his men saw the appellant getting out of the taxi and walking towards the row of shops. They then followed him. On reaching Kedai Wah Seng Cold G Storage PW5 stopped the appellant and simultaneously introduced himself as a police officer. The appellant was arrested and the police conducted a body search. In the appellant's left rear pocket PW5 found a small packet containing dried plant material suspected to be cannabis (P13) and a bunch of keys with a remote control attached H to it. By using the key and the remote control, PW5 opened the door of the taxi and searched the taxi. Under the driver's seat, he found a plastic bag containing a compressed slab of plant material suspected to be cannabis (P9). PW5 found that P9 was wrapped with transparent plastic package on the outer layer and an I aluminium foil on the inner layer, attached together with a yellow coloured cellotape.

[5] The Government Chemist, one Muhammad Yazid bin Ibrahim (PW1), analyzed the plant material *viz*. P13 and P9 and confirmed them to be cannabis as defined under s. 2 of the Act. P9 found under the driver's seat weighed 466.40 grams and P13 weighing 0.70 grams.

[6] In the course of the trial, Zaharah binti Abdul Jalal (PW2), being the owner of the taxi, testified that she bought the taxi in 2002 but since then had rented it out to one Razali bin Omar (PW3) for a monthly rental of RM400. PW2 testified that she never used the taxi and did not have any knowledge of any person who used the taxi on that particular date. PW3 in his evidence testified that he regularly drove the taxi to transport passengers. According to him, the taxi was always under his custody and when not plying for passengers always parked it at his house at No. 48, Jalan Seroja 13, Taman Johor Jaya, Johor. He further testified that he had in his possession both the main and secondary keys. He regularly used the main key, with the secondary key being placed inside an unlocked drawer, at his house. PW3 admitted that the appellant was his friend. On 24 July 2010, at about 1am the appellant borrowed the taxi from him at Restoran Tim Yam, Flat Larkin on the pretext that his taxi had broken down and had wanted to pick up some passengers. PW3 further testified that he sent the taxi to a car wash centre on 22 July 2005, and conceding not to have inspected or clean the interior part of the taxi, prior to handing it over to the appellant on 24 July 2005. He testified that he did not find any plastic bag inside the taxi when it was sent for cleaning at the car wash centre. He was unaware of passengers leaving anything inside the taxi or had received any request from them to place anything under the driver's seat.

[7] It was based on the above evidence and the following reasoning that the learned judge was satisfied that *prima facie* cases had been established for both charges by the prosecution, in that:

i. when arrested P13 was found on the body of the appellant and could not be said to have not known of it. On this issue we found no error on the learned judge's conclusion;

ii. the appellant borrowed the taxi from PW3 prior to the arrest and therefore had custody and control of it, together with P9, which was the basis of the first charge;

A iii. P9 ie, the 466.40 grams of cannabis were found under the driver's seat of the taxi. The appellant was the only person who came out of the taxi;

iv. P9, was well wrapped in a transparent plastic package with a
B yellow cellotape attached to it. The court found that the appellant could see the packet through the plastic bag and that he had knowledge of the cannabis found under the seat;

v. the prosecution had succeeded in proving the essential ingredients of custody, control and knowledge of P9. Knowledge
C here was established by direct evidence;

vi. the learned judge had also relied on the authority of *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 to support his decision; and

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vii. being satisfied of the knowledge having been established for both charges the defence was called.

[8] In the notes of proceedings at p. 45 of the appeal record, the
E learned judge said since the amount seized was 466.40 grams of cannabis, s. 37(da) of the Act was therefore applicable. With all the material ingredients satisfied he then called for the defence. At the end of the case he found the appellant guilty of both charges and gave his reasons in the grounds of judgment. As said earlier we found no error over the conviction against the second charge ie, of
F being in possession of P13. Our dissatisfaction was only as regards the first charge.

[9] It is observed that, after a rather detailed discussion of the ingredient of possession in the grounds of judgment, prior to calling
G the defence, the learned judge failed to take the next expected step of evaluating the ingredient of trafficking. Why there was no mention of the latter ingredient in the grounds of judgment, let alone carry out a maximum evaluation of it, was beyond us. As said above, if not for a mere mention in the notes of proceedings (and
H not in the grounds of judgment) at p. 45 of the appeal record of the invocation of the presumptive provision, we would have been at a loss as to the route undertaken pertaining to the establishment of the ingredient of trafficking. To exacerbate matters, again in the grounds of judgment when discussing the evidence at the defence
I stage, the learned judge made no attempts to discuss the facts that led to the invocation of s. 37(da) of the Act or make a maximum evaluation of the evidence in relation to it. This failure went against

the enunciation of the Federal Court in *Balachandran v. PP* [2005] 1 CLJ 85 in that a presiding judge must undertake a maximum evaluation exercise at the end of the prosecution and again at the defence stage. Instead he merely stated in the grounds of judgment, regarding the ingredient of trafficking, in the following manner:

> Sebagai kesimpulan, Mahkamah memutuskan bahawa pembelaan tertuduh telah gagal menimbulkan keraguan yang munasabah terhadap kes pihak pendakwaan dan juga atas imbangan kebarangkalian. Tertuduh telah gagal mematahkan anggapan di bawah seksyen 37(da) ADB 1952.

[10] The want of evaluation of the trafficking ingredient aside, the above statement is downright confusing, as it conveys the message that the appellant had failed to create a reasonable doubt against the prosecution's case and also on a balance of probability. Does it mean that the issue of balance of probability was in relation to the presumption section or that the appellant must rebut the prosecution's case on a reasonable doubt and also on a balance of probability? The want of maximum evaluation on the ingredient of trafficking (to be discussed later) and confusing burden on the appellant was of no help either to the prosecution's case.

[11] We now delve more thoroughly as to why we acquitted him and set aside the conviction for the first charge. To satisfactorily supply the reasons we need to recap the evidence. For starters we found that the prosecution had failed to establish the ingredient of knowledge when arrested with P9. In order for the prosecution to establish possession, it must in the first place establish that the appellant was aware of the presence of the package. This is the custody and control stage. Having satisfied this requirement the ingredient of knowledge will be next.

[12] From the grounds of judgment it was obvious that the learned judge held the view that the appellant knew of P9 being under the driver's seat. After a careful perusal of the notes of proceedings and the grounds of judgment we were unable to agree with him. We found, *inter alia* that:

a) the learned judge had chosen to ignore the evidence of PW5 who testified that the cannabis could be inserted from the rear part of the seat. He testified:

> Saya setuju yang eks. P9 boleh dimasukkan dari bahagian penumpang di belakang. Kalau ada penumpang yang sorokkan di situ OKT mungkin tidak tahu. Saya tidak boleh nafikan. Sesiapa pun boleh letak eks. Di dalam teksi itu.

A Rather than accepting PW5's evidence the learned judge had instead opined that P9 could also be inserted from the front side of the driver seat, when discussing the issue of seat adjustment. With the evidence admitting to two or more inferences, and by refusing to submit to PW5's testimony the
B learned judge had failed to draw the inference that was most favourable to the appellant (*PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457). This was certainly disastrous to the appellant and an erroneous approach on the part of the learned judge;

C b) the learned judge found that there was no reason why any passenger would place the package at the driver's seat. The fact that the contents of the package were valuable led the learned judge to state that it was impossible for any passenger to leave the package under the seat. The learned judge even went one
D step further by stating that the space under the driver's seat was not meant for passengers to keep their things. The learned judge had misdirected himself here, as what was relevant was that things could be hidden under the driver's seat, and not that the space was meant for passenger usage. The strong views
E held by the learned judge, regarding the abandoning of the package under the seat by a passenger was without substance as there could have been many reasons why any passenger would do that. What was staring in the face of the learned judge, and could not be ignored, was that no less than four passengers
F were picked up within those few hours by the appellant when plying his trade, before being arrested, and that the package was capable of being inserted under the driver's seat from the rear. But the learned judge chose to ignore them and in the course of it had seriously misdirected himself. If we may add it was not
G incumbent on the appellant to supply the reasons why passengers leave things behind. He was only required to rebut the prosecution's case on a reasonable doubt; and

c) the learned judge also made much of the evidence pertaining to
H the adjustment of the driver's seat by the appellant despite there being no mention of it at the prosecution's stage. This issue cropped up at the defence stage in the course of the cross-examination. The appellant agreed that he needed to adjust the driver's seat for his own comfort before driving the said taxi, but
I in no uncertain terms denied seeing the package when in the act of adjusting it. Yet despite the dearth of evidence, the learned judge found that the appellant could know of the plastic bag placed and contents under him, when adjusting his seat. The learned judge wrote:

> … Tertuduh sememangnya mengetahui kewujudan eks. P9 berada di bawah kerusi tempat duduk pemandu. Ini kerana tertuduh bersetuju semasa disoal balas bahawa beliau perlu untuk adjust/ubah tempat duduk pemandu supaya boleh memandu dengan selesa. **Ini menunjukkan bahawa tertuduh boleh mengetahui kewujudan eks. P9 dan kandungan** (emphasis added).

We found this view totally intolerable, as to equate the act of adjusting the driver's seat with capability of seeing the package under the seat, was a view that lacked substance. Adjusting the driver's seat is a normal conduct by any person who wants to drive someone else's motorcar (a taxi in the present case). There is nothing in the notes of proceedings of evidence adduced that at 1am the appellant was looking down, that the lighting was sufficient, that his head was not looking straight ahead when he pulled the lever etc.

It was beyond us how the learned judge could have arrived at that finding of fact that he saw P9, when there was not an *iota* of evidence submitted to support the above conclusion. We concluded that the learned judge was in error when delving into the realm of speculation and arriving at the unsubstantiated conclusion that the appellant saw the package.

Since the appellant had clearly evinced that he did not see the package, and there was no evidence to say otherwise, we then must accept the fact that he indeed did not see the package. Even if we were not to believe him but if a reasonable doubt had been raised he was thus entitled to an acquittal (*Mat v. Public Prosecutor* [1963] 1 LNS 82).

[13] Since the prosecution had failed to establish that the appellant knew the package was under his seat it would naturally follow that he would not know the contents. End of matter.

[14] On the other hand, to be on the safe side, let us assume that he saw the package, thus begging the question whether he knew the contents, a need arises to prognose this. It is a fact that the cannabis was placed inside a plastic bag, with the words 'The Store' imprinted on it. The compressed cannabis was wrapped in transparent plastic package (outer layer) and aluminium foil (inner layer). A yellow cellotape was also found attached to it. PW5 testified that the cannabis could not be seen and ordinary people would not know it was cannabis. Yet despite the above testimony the learned trial judge concluded that *mens rea* had been established by direct evidence, and remarked:

A Dengan hormat, mahkamah tidak dapat bersetuju dengan hujah dan penilaian keterangan seperti yang dihujahkan oleh peguambela terpelajar. Adalah tidak dapat dipertikaikan bahawa Tertuduh mempunyai milikan sebenar dadah yang menjadi hal perkara pertuduhan. Bagi pertuduhan pertama, keterangan yang ada menunjukkan:

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(a) Eks. P9 dijumpai di bawah tempat duduk pemandu teksi yang dipandu seorang diri oleh Tertuduh;

(b) Teksi tersebut telah diserah kepada Tertuduh oleh SP3 sebelum kejadian;

C

(c) Eks. P9 ditemui oleh SP3 (typographical error?) dalam bungkusan plastic lutsinar serta berselotape. Dengan itu, kandungannya boleh dilihat dari luar.

D **[15]** Making a statement that the appellant had possession of P9, just because it was under the driver seat and that he was the sole driver of the taxi, was a bare statement without more. Unless knowledge is proved, an item however close to a person, could just be miles away. The same argument applies pertaining to the handing over of the vehicle to the appellant by PW3 prior to the E arrest. Handing over does not carry with it the knowledge of the complete items that goes with the vehicle especially the hidden ones. The last finding that P9 could be seen from the outside by the naked eye was confusing, as we were unsure whether the learned F judge meant to say of the package, which was the content of the plastic bag, or the drugs. Having perused the grounds of judgment in its entirety, together with the notes of proceedings, we found nothing to indicate that the cannabis could be seen by the naked eye. This has to be about the only conclusion we could arrive at as G PW5 had clearly stated that the cannabis could not be seen or known to be cannabis by a man on the street. His testimony reads as follows:

Setuju eks. P9 berbalut plastic dan kertas timah. Ia dibalut dengan selotape kuning. Setuju tak boleh nampak dari luar. Setuju jika H orang biasa melihat ketulan dan daun mampat itu, dia tidak tahu ianya adalah cannabis.

[16] With the benefit of the doubt given to the appellant it must mean that only the package could be seen. With the finding of I knowledge being founded on direct evidence, and no evidence of the appellant knowing of the presence drugs having been established conclusively, (and in fact the reverse held true), we were satisfied

that the prosecution had failed to establish the ingredient of possession. In *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356, their Lordships had remarked:

> If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains then, ordinarily, I would suppose that there would not be possession.

[17] Alluding to another approach, to establish that the appellant had knowledge of P9, the learned DPP had referred to *Mohd Zaiham Mislan v. PP* [2010] 1 CLJ 1 and *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337, on account of him being in control of the taxi. In the latter case the respondent was charged and convicted of trafficking in dangerous drugs under s. 39B(1)(a) of the Act. The drugs weighed 4826.9 grams of cannabis, as defined under s. 2 of the Act. One package was found under the driver's seat and 2 packages under the front passenger's seat. Altogether there were five blocks of compressed plant material confirmed to be cannabis. In convicting the respondent, the court held that the respondent must have had custody and control of the drugs, since he was alone at the material time and had been in possession of the car for some seven months prior to his arrest. Incidentally this car was a rented vehicle and not a taxi.

[18] Distinguishing the facts of the present appeal to *Abdul Rahman Akif*, it is incontrovertible that the appellant here borrowed the taxi from PW3 on 24 July 2005 at about 1am. He was arrested at about 4.20am on the same date. In a word he had the vehicle only for 3 hours and 20 minutes, as compared to the seven months in *Abdul Rahman Akif*. The amount seized from the taxi was small ie, literally about 10% of the amount compared to *Abdul Rahman Akif*'s case. To have missed a small package hidden away under the seat was not an inherently incredible suggestion. To be totally oblivious of a large amount of cannabis, inserted under the passenger and driver's seats in the course of the seven months, when having custody and control of the vehicle for such a long time, was an absurd defence. The Federal Court opined that little effort was required to uncover what was contained in the packages. Another distinguishing factor is that, the vehicle in question here is a taxi, and as confirmed by PW5 the compressed slab could possibly have been placed or inserted by any passenger when sitting at the rear passenger seat. There was evidence adduced to show that some of the passengers were sent to Kg. Melayu, Majidee and Taman

A Sentosa, and prior to using the taxi it was driven by PW3. In *Abdul Rahman Akif* the issue of any member of the public entering the vehicle and leaving any package behind did not arise.

[19] We now discuss the ingredient of trafficking on the
B hypothetical premise that the prosecution had successfully established the ingredient of possession. PW5 had testified, and confirmed by the appellant that he was outside the taxi, when the search was conducted. In fact the arrest took place when he was moving away from the taxi and walking towards the direction of the
C row of shops. Thus he was walking away from the drugs. At that stage there was no third party around, which could bring that possession to another level ie, a transaction with a third party. In a gist, at that precise moment, he merely was in passive possession of the drugs even though the amount of drugs was above the
D presumption level (*PP v. Haling Arala Jimjani* [2008] 4 CLJ 163). There was no tell-tale sign of overt act, conduct or evidence which could upgrade that possession to trafficking. Even PW5 had confirmed that the appellant did not put up any struggle or attempt to flee from the scene, as in *Haling Arala Jimjani*, but only looked
E stunned and surprised when arrested. Even though the appellant was alleged to have pushed away the hands of PW5 at the time of arrest, there was nothing to indicate that his reaction was not pertaining to the drugs found on him rather than of P9. This is one of the dangers of including a minor charge to a capital
F punishment charge; and without such evidence to prove that the conduct was P9 related the benefit of the doubt regarding this physical reaction, must be given to the appellant. On the above grounds we were satisfied that he had rebutted the presumption of trafficking on a balance of probability.

G **[20]** With knowledge not established, and the ingredient of trafficking easily rebutted, even had possession been established, we had no hesitation in allowing the appellant's appeal for the first charge, and dismissing his appeal for the second. The order made
H by the High Court for the first charge was set aside and that of the second charge affirmed.

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